UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/C.12/2001/SR.79
29 November 2001

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Twenty-seventh session

SUMMARY RECORD OF THE 79th MEETING

Held at the Palais Wilson, Geneva,
on Monday, 26 November 2001, at 10 a.m.

Chairperson: Ms. BONOAN-DANDAN

CONTENTS

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (continued)

Follow-up to the day of general discussion on article 15, paragraph 1 (c) (continued)

Draft statement on intellectual property and human rights (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Official Records Editing Section, room E.4108, Palais des Nations, Geneva.

Any corrections to the records of the meetings of the Committee at this session will be consolidated in a single corrigendum to be issued shortly after the end of the session.

GE.01-46318 (E) 281101 291101

The meeting was called to order at 10.20 a.m.

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (agenda item 3) (continued)

Follow-up to the day of general discussion on article 15, paragraph 1 (c) (continued)

Draft statement on intellectual property and human rights (continued) (Future E/C.12/2001/15)

1. The CHAIRPERSON reminded members that the initial draft of the Committee's statement (E/C.12/2001/15 (Future)) had been produced by Mr. Malinverni and members of the secretariat, in consultation with a number of experts from the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR). Since the previous meeting, the initial draft had been the subject of discussion at a workshop attended by a number of members of the Committee and other experts in the fields of intellectual property and of human rights. The document had been amended at that workshop and the latest version was now available in the meeting room in English only.

2. The statement was not a general comment: it was an expression of general principles, not of Committee policy or legal standards. A general comment on article 15 would be considered at a later date.

3. In answer to a question from Mr. WIMER ZAMBRANO, she said that the introductory section now contained more background information, and that a clearer description of the purpose of the Committee's statement was included in paragraph 2.

4. In answer to a question from Mr. SADI, she said that, while in the past the Committee's statements had often been prompted by a particular event or occasion, that had not always been the case. Its statement on globalization was one such example; the present statement was another.

5. In keeping with the Committee's style, the title of the statement had been amended to "Intellectual Property and Human Rights". She took it that the Committee wished to adopt that title.

6. It was so decided.

7. The CHAIRPERSON invited Committee members to comment on, or propose amendments to, the latest draft of the statement.

Paragraph 1

8. Mr. RIEDEL suggested replacing the words "promoting the enjoyment of human rights", in the first sentence, with "promoting or inhibiting the enjoyment of human rights".

9. It was so decided.

10. The CHAIRPERSON, replying to a question from Ms. BARAHONA-RIERA, said that the issue of traditional knowledge and the interests of indigenous peoples in respect of intellectual property rights had been raised by Mr. Ceausu at the workshop and was addressed in the latest draft.

11. Mr. SADI said that a definite article should be inserted before the word "creation", in the first sentence.

12. It was so decided.

13. Mr. SADI said that the "importance of intellectual property for human rights", referred to in the third sentence, could in fact be attributed to the two developments mentioned subsequently; he therefore suggested replacing the word "reflects" by the words "stems from" or "is due to".

14. The CHAIRPERSON said that would alter the meaning of the sentence. It would not be correct to say that the importance of intellectual property for human rights was attributable to those two developments; it could be attributed to many things. However, it did reflect those two developments.

15. Mr. HUNT suggested replacing the word "can", in the second sentence, by the word "may". However, he wondered whether there was really any doubt as to the consequences referred to. He suggested the following formulation, which would make the sentence rather stronger: "The allocation of rights over intellectual property has significant economic and social consequences that affect the enjoyment of human rights."

16. Mr. SADI agreed: cause and effect had been established: if the Committee had any doubts about that, no statement would be necessary. Moreover, if the sentence was going to refer to economic and social consequences, it should also refer to cultural consequences.

17. Mr. MALINVERNI supported the inclusion of a reference to cultural consequences. However, he preferred to retain the word "may". "Significant consequences" might not arise in every case.

18. Mr. RIEDEL agreed: there was no need for such a sweeping assertion.

19. Mr. HUNT supported the insertion of the word "cultural". He was puzzled, however, by the preference for the word "may": surely the Committee must consider that allocation of intellectual property rights was bound to affect human rights, since article 15 of the Covenant referred to intellectual property. He suggested either retaining both "significant" and "may" or deleting both words.

20. Mr. RIEDEL said that not every economic, social and cultural consequence of the allocation of intellectual property rights raised human rights issues. The human rights dimension did not call for such sweeping assertions. He favoured retaining both "significant" and "may".

21. Mr. MALINVERNI said he now saw the virtue of Mr. Sadi's view with regard to the use of the word "reflects" in the third sentence. A phrase such as "is due to" would better convey the idea of cause and effect.

22. The CHAIRPERSON said that if the Committee used the categorical expression "affects" in the second sentence, instead of "may affect", then it would be right to amend the word "reflects" in the third sentence. If it followed Mr. Riedel's suggestion and retained "may affect", then it must also retain "reflects". She tended to agree with Mr. Riedel: the Committee suspected that there were such effects but it could not be sure. She favoured a more cautious approach, even if the resulting statement was blander, rather than a firmer statement that the Committee might be obliged to retract later. She suggested, therefore, that the second sentence should read: "The allocation of rights over intellectual property has significant economic, social and cultural consequences that may affect the enjoyment of human rights."

23. It was so decided.

24. Mr. HUNT suggested inserting the word "contemporary" before the word "importance" in the third sentence.

25. It was so decided.

26. Paragraph 1, as amended, was adopted.

Paragraph 2

27. Mr. HUNT read out a proposal for a revised draft paragraph 2, which he had circulated in the Committee room, in English only:

> "The Committee has resolved to prepare and adopt, as soon as possible, a general comment on intellectual property and human rights. Because of its existing commitments, however, the Committee will not be in a position to finalize and adopt such a general comment until 2003 at the earliest. In the meantime, intellectual property remains high on the international agenda. In these circumstances, the Committee has decided to adopt this statement as its preliminary contribution to the rapidly evolving debate on intellectual property. The statement aims only to identify some of the key human rights principles, deriving from the Covenant, that are required to be taken into account in the development and interpretation of contemporary intellectual property

regimes. These basic principles will be further refined, elaborated and applied in the Committee's forthcoming general comment on article 15. Conscious of the importance and complexity of integrating human rights into intellectual property regimes, the Committee confirms its willingness to discuss the issues identified in the statement with all relevant actors."

28. He pointed out that the final sentence of the revised draft paragraph had been borrowed from the final sentence of paragraph 17, which was the final paragraph of the draft statement.

29. Since the distribution of his proposed revision, the suggestion had also been made to retain the original paragraph 2 up to and including "future discussion and action", with the words "and for a future general comment on the issue of intellectual property and human rights, particularly in the context of article 15 of the Covenant" deleted; and to insert his proposed paragraph 2 before paragraph 3.

30. Mr. MALINVERNI said he would prefer to keep the final sentence of Mr. Hunt's proposed paragraph as the final sentence of the statement.

31. With regard to the second suggestion referred to by Mr. Hunt, it seemed to him that the beginning of the original paragraph 2 had been incorporated, with some modifications, into the fourth sentence of Mr. Hunt's proposed paragraph 2. There would be little point in retaining that part of paragraph 2, only to repeat it in the following paragraph.

32. He also suggested that the reference to "the development and interpretation of contemporary intellectual property regimes", in the fifth sentence of Mr. Hunt's proposed paragraph 2, should be expanded to "the development, interpretation and implementation ...", as in the first sentence of the original paragraph 2.

33. Mr. SADI said that the second sentence of Mr. Hunt's proposal was superfluous and should be deleted.

34. Referring to the fifth sentence, he said human rights could not be taken into account in the interpretation and implementation of intellectual property regimes unless they had also been taken into account at the design and development stage. He suggested rephrasing the relevant part of that sentence to read, "... taken into account in the design and development of contemporary intellectual property regimes and their eventual interpretation and implementation".

35. Mr. RIEDEL said that the first two sentences of the original paragraph 2 should be incorporated into Mr. Hunt's proposed version. He endorsed Mr. Sadi's proposal to remove the second sentence of Mr. Hunt's version, because it was already clear that a general comment would be adopted and the tone of the sentence was somewhat defensive. Although the last sentence of Mr. Hunt's version more or less replicated the contents of paragraph 17, he was not in favour of deleting it, as it was useful to establish the Committee's aims at an early stage.

36. Mr. PILLAY said he favoured Mr. Hunt's version because it was more straightforward than the original. However, he suggested several amendments. The second sentence should be

deleted. The third sentence should be incorporated into the fourth sentence, which would read: "The Committee, however, has decided to adopt this statement as its preliminary contribution to the rapidly evolving debate on intellectual property, which remains high on the international agenda." The word "applied" should be replaced by "implemented". He agreed with Mr. Riedel that the last sentence should be retained.

37. Mr. CEAUSU endorsed the amendments suggested by Mr. Pillay. He suggested replacing the words "as soon as possible", in the first sentence, with "by the end of 2003".

38. The CHAIRPERSON said the Committee should not make promises it might not be able to keep. Nor was she happy with the proposal to replace the word "applied" with "implemented".

39. Mr. MALINVERNI said that the first sentence of the original version was extremely similar to the fifth sentence in Mr. Hunt's version. In order to avoid repetition, the Committee should decide in favour of one formulation or the other.

40. Mr. RIEDEL, supported by Mr. PILLAY, said that for reasons of style and clarity he favoured Mr. Hunt's version.

41. Mr. HUNT, summarizing members' reactions to his proposal for a revised draft paragraph 2, said there seemed to be consensus that it was to be preferred to the original paragraph 2. There was unanimous support for the deletion of its second sentence. The third and fourth sentences would be combined, as proposed by Mr. Palley. That sentence would, in his view, be further improved by replacing the word "decided" with "resolved". The following sentence would be amended as proposed by Mr. Malinverni. The only remaining question was the location of the final sentence of the draft.

42. The CHAIRPERSON said that in her view it would be more appropriate to retain the last sentence of Mr. Hunt's version as the final sentence of paragraph 17.

43. The new paragraph 2, as amended, was adopted.

Paragraph 3

44. Ms. BARAHONA-RIERA suggested that, in addition to the intellectual property treaties administered by WIPO and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of WTO, mention should be made of the Convention on Biological Diversity (CBD). The CBD had been signed by 175 States and made specific reference to the fact that intellectual property rights had to be supportive of and not run counter to its objectives regarding biological diversity and genetic resources.

45. Mr. MALINVERNI said that the Committee could not provide an exhaustive list of all relevant treaties. The fact that the sentence began with the words "in particular", indicated that the treaties mentioned served only as examples.

46. The CHAIRPERSON acknowledged Ms. Barahona-Riera's concern but said that she favoured a minimalist approach for the purpose of the statement, which was supposed to be very general. The danger with exhaustive lists was that they ran the risk of omitting some crucial element.

47. Mr. WIMER ZAMBRANO said he saw no good reason for omitting the CBD from the list of exam0ples. It was of prime importance for many developing countries.

48. Mr. HUNT suggested several editorial amendments, and also endorsed the proposal to include the CBD in paragraph 3, as an indication that the Committee was trying to foster a balanced approach.

49. Mr. RIEDEL said that the original version had been drafted after careful discussion with specialized agencies. TRIPS had been mentioned because it dealt specifically with intellectual property rights, as did the WIPO treaties. While only one article of the CBD referred to intellectual property, there was no reason not to include it if Committee members considered it to be appropriate. However, the new draft would have to be prepared with care. In any case, he had taken note of Ms. Barahona-Riera's comment; the CBD was undoubtedly important and would be mentioned in the general comment, if not in paragraph 3.

50. Mr. WENDLAND (World Intellectual Property Organization) said that on the whole, the statement had been well drafted, was easy to read and reflected the complexities of the debate. He suggested replacing the words "in particular", in the second sentence, with "for example", to highlight the fact that the Committee was aware of the existence of other important instruments.

51. Mr. PILLAY said that he favoured the formulation "in particular" because it underlined that the examples given included the principal treaties in that field. Reference could also be made to the Universal Copyright Convention, which was administered by the United Nations Educational, Scientific and Cultural Organization.

52. Mr. MALEMPRÉ (United Nations Educational, Scientific and Cultural Organization) (UNESCO) said that reference could also be made to the Universal Declaration on the Human Genome and Human Rights, which had been adopted by UNESCO.

53. The CHAIRPERSON again urged caution: the Committee's aim was to produce only a very general statement that did not attempt to address all the relevant issues. It must beware of making statements it might be forced to retract when it came to draft a general comment.

54. Mr. MALINVERNI, supported by Mr. RIEDEL, strongly endorsed the Chairperson's comments: the sole purpose of the second sentence was to illustrate the first sentence by means of a few examples.

55. The CHAIRPERSON suggested that Ms. Barahona-Riera should draft a new version of paragraph 3, including mention of the CBD, for discussion at the Committee's next meeting.

56. It was so decided.

Paragraph 4

57. The CHAIRPERSON drew members' attention to the new sentence in bold type, which reflected a concern raised by Mr. Ceausu.

58. Mr. PILLAY said that, in the second sentence, the word "claims" should more correctly be "rights".

59. Mr. MALINVERNI said that "claims" had been used so as to avoid two occurrences of the word "right" in the same sentence.

60. Mr. HUNT suggested a number of minor editorial amendments. He also drew attention to a contradiction in the first two sentences: the first sentence referred to article 15, paragraph 1, which covered the right to take part in cultural life; while the second stated that those rights must be balanced with the right to take part in cultural life. He agreed that the word "claims" should be replaced by the word "rights", in particular since the legal sense must prevail over the stylistic one.

61. Mr. RIEDEL said that since article 15, paragraphs 1 (a) and 1 (c) both referred to rights, it was appropriate that the term "right" should appear twice.

62. Mr. SADI said that the word "right" had to be used in both instances in order to preserve the notion that both were rights that should be accorded equal treatment.

63. Mr. PILLAY said that article 15, paragraph 1, simply enumerated rights; it did not require that those rights should be balanced. The first two sentences should be redrafted accordingly.

64. Mr. MALINVERNI said that the word "balance" had been chosen after careful consideration. The problem might be resolved by citing article 15, paragraph 1 (c), at the start of the first sentence.

65. Mr. RIEDEL said that, in the context, the notion of "balance" indicated that paragraphs 1 (a) and 1 (c) of article 15 should be read together. The word "balance" was used more broadly later in the text to indicate the material regimes of intellectual property. In his view, the text should stand.

66. Mr. PILLAY said the word "balance" suggested that each right depended on the other. The rights existed, and they did not need to be balanced with each other. The rights enumerated in article 15, paragraphs 1 (a), 1 (b) and 1 (c), were all guaranteed in the same manner.

67. The CHAIRPERSON said that Mr. Pillay was describing an ideal world; in reality those rights were pitted against each other.

68. Mr. MALINVERNI said that the idea of "relationship " or "rapport" might work better than that of "balance". He suggested that the first sentence should end with the words "authors".

69. Mr. HUNT supported Mr. Malinverni's suggestion that the first sentence should begin with a reference to article 15, paragraph 1 (c). The sentence should, however, conclude with the words "authors in their works". It should be noted that the heading to paragraph 12 of the text was "Balance".

70. Mr. PILLAY proposed that the first sentence should be retained in full. The words "The Covenant also specifies" should be deleted from the second sentence, which should simply enumerate the rights described in paragraphs 1 (a), 1 (b) and 1 (c).

71. Mr. MALINVERNI, supported by Ms. BARAHONA-RIERA, said that he regretted the loss of the notion of balance: in his view, the authors of the text had sought to emphasize the relationship between the rights enumerated in article 15, paragraphs 1 (a), (b) and (c), rather than the distinctions between them.

72. Mr. MARTYNOV endorsed Mr. Pillay's view: the Covenant did not specify that those rights must be balanced. He suggested that the second sentence might begin: "The Committee considers that ..." and continue unchanged.

73. Mr. RIEDEL endorsed Mr. Malinverni's proposal that the idea of rapport or relationship should replace the idea of balance.

74. Mr. PILLAY said that if Mr. Martynov's proposal were adopted, it would not be necessary to avoid the word "balance".

75. The CHAIRPERSON said that the members of the Committee seemed to agree that the first sentence of the paragraph should begin by citing article 15, paragraph 1 (c), and end with the words "authors in their works". In addition, the second sentence would begin with the words "The Committee considers that," and continue unchanged.

76. It was so decided.

77. Mr. RIEDEL said that the fifth sentence was a strong, important statement of policy rather than an explication of legal human rights principles. Although he would not object to its use, he thought the Committee should take note that it was using stronger language than it would employ in a general comment.

78. Mr. GRISSA asked what was meant by the term "systems" in the fifth sentence.

79. Mr. WAGER (World Trade Organization) said that an intellectual property lawyer would understand the term "systems" to mean any laws, regulations, registration systems, or administrative or managerial structures necessary for the protection of intellectual property.

80. Mr. WENDLAND (World Intellectual Property Organization) said that he agreed with the previous speaker. However, some lawyers preferred to refer to the areas of intellectual property law, such as patents, copyrights and trademarks, as "branches" of a single "system".

81. Mr. HUNT said that, in the light of those remarks, the word "systems" seemed acceptable in that context.

82. Paragraph 4, as amended, was adopted.

Paragraph 5

83. The CHAIRPERSON said that the heading "The international human rights normative framework" should be deleted. In addition, the words "based on human dignity" should be deleted from the heading "Universality, indivisibility and interdependence of human rights".

84. Mr. WIMER ZAMBRANO said that the heading "Universality, indivisibility and interdependence of human rights" seemed unrelated to the text that followed.

85. The CHAIRPERSON said that paragraphs 5 and 6 defined intellectual property within the realm of universality, indivisibility and interdependence. Paragraph 6 dealt with universal and inalienable entitlements, which derived their validity from the notion of the universality, indivisibility and interdependence of human rights. In her view, it was worthwhile to retain the heading.

86. Mr. WIMER ZAMBRANO said that perhaps the heading should be simply "universality of human rights" leaving aside their indivisibility and interdependence.

87. Mr. MALINVERNI said that the third sentence of paragraph 5 invoked the "entire range" of rights and their relevance to intellectual property systems. The final sentence spoke of "all human rights, including the full range of economic, social and cultural guarantees". In his view, the paragraph clearly dealt with the notion of the indivisibility and interdependence of human rights.

88. Mr. SADI said that the first two sentences should be deleted. He saw no need to educate readers about the meaning of human rights. The paragraph should begin with the third sentence, with the word "Consequently" deleted.

89. Mr. HUNT proposed several minor editorial revisions. He suggested that the words "facilitate and promote" in the last sentence should be changed to "promote and protect" unless there was a reason to deviate from the usual wording. In addition, he proposed the deletion of the words "the type and level of protection afforded under any" and "therefore". The acronym "ICESCR" should be changed to "Covenant".

90. Mr. RIEDEL said that he also favoured the formulation "promote and protect". However he strongly opposed the proposal to delete the first two sentences. The Committee was considering the human rights dimension of intellectual property rights, and should always be conscious of the inalienable and fundamental principles addressed in the two Covenants and in

the Universal Declaration of Human Rights when dealing with the matter of intellectual property rights. Many property questions did not relate to those rights, and certain issues discussed under the rubric of intellectual property rights were not human rights matters. The first sentence was necessary in order to make such distinctions clear. That sentence was also consistent with the sentences that followed, in particular the last one.

91. Mr. GRISSA said he was in favour of deleting the first sentence.

92. Mr. MALINVERNI, supported by Mr. RIEDEL said that the two sentences reflected different ideas and should both be retained.

93. The CHAIRPERSON, speaking as a member of the Committee, said that, since the text would also be read by the public at large, clarity of context was more important than possible repetition.

94. Mr. SADI said he could accept retention of the two sentences.

95. Mr. HUNT proposed that the last sentence of the paragraph should be amended to read: "To be consistent with obligations to respect international human rights, intellectual property regimes must promote and protect all human rights, including the full range of economic, social and cultural guarantees specified in the Covenant".

96. Mr. MALINVERNI supported the proposal.

97. Mr. WIMER ZAMBRANO said that, since the Covenant related to economic, social and cultural rights, there seemed to be no need to repeat those words in the final sentence, which could end with the words "including the rights guaranteed in the Covenant".

98. Responding to a comment by Mr. SADI, Mr. MALINVERNI said that, since the text related to the universality, indivisibility and interdependence of human rights, there was no question of encroaching on the mandates of other treaty bodies.

99. The CHAIRPERSON said she took it that the Committee agreed to adopt paragraph 5 on the basis of the amendments proposed.

100. Paragraph 5, as amended, was adopted.

Paragraph 6

101. The CHAIRPERSON drew attention to amendments incorporated into the revised English text. It was proposed that, in the second sentence, the word "claims" should be replaced by "entitlements" and, in the third sentence, the words "aim to realize some of these fundamental rights" replaced by "seek to provide incentives for inventiveness and creativity for the benefit of society". She also drew attention to the proposed additional sentence, shown in the revised text, at the end of the paragraph. The words "of international agreements" should read "or international agreements".

102. Mr. MALINVERNI, referring to an observation by Mr. GRISSA, agreed that the paragraph seemed long but said that the aim was to devote each paragraph to a specific concept. Perhaps the text could be editorially redrafted - using indents, for example - for greater clarity. Although the word "while" might appear overused the main concern was not to impede the flow of the text.

103. Ms. BARAHONA-RIERA requested clarification of the reference to intellectual property rights as "instrumental" rights

104. Mr. PILLAY said that the paragraph well reflected the flow of ideas. He proposed that, in the third sentence, the word "while" should be replaced by "whereas". The word could be retained in the fifth sentence, but "can be allocated" should be replaced by "may be allocated" and "claims" by "entitlements". The sixth sentence should be replaced by two separate sentences, reading: "Human rights, on the one hand, are dedicated to assuring satisfactory standards of human welfare and well-being. Although intellectual property regimes traditionally provided protection to individual authors and creators they are, on the other hand, increasingly focused on protecting business and corporate interests and investments".

105. Mr. SADI agreed that the word "claims" should be replaced but felt that a better word would be "rights". He also felt that the expression "for the benefit of society" was somewhat presumptuous.

106. Mr. MALINVERNI, referring to the statement by Ms. Barahona-Riera, said that the intention was to highlight the difference between intellectual property rights and human rights, while stressing that the human person was to be the ultimate beneficiary.

107. Mr. RIEDEL supported the proposal to replace "claims" by "entitlements". The difference between human and legal rights was the former's inalienability - a distinction that must be brought out.

108. Ms. BARAHONA-RIERA thanked Mr. Malinverni for his explanation. In her view, the text remained unclear, particularly as to the extent to which individual rights, as opposed to rights derived from intellectual property systems were involved.

109. Mr. HUNT proposed that the third sentence should be amended to read: "Human rights are fundamental as they derive from the human person, whereas intellectual property rights are instrumental in that they are a means by which States seek to provide incentives for inventiveness and creativity from which society may benefit". He also proposed that, in the fifth sentence, the words "human rights are timeless, and expressions" should be amended to read "human rights are timeless expressions".

110. Mr. CEAUSU said that the text was still too repetitive. The third sentence could perhaps be deleted and the fourth and fifth sentences possibly merged.

111. Mr. GRISSA said he was concerned lest the statement that human rights were individual might be seen to conflict with instances of corporate rights to intellectual property, not to mention rights as a producer and rights as an individual consumer.

112. Mr. MALINVERNI said the important distinction with regard to intellectual property rights was that they were instrumental, temporary and capable of being revoked, licensed, altered or assigned; they were, moreover, increasingly focused on promoting corporate interests. He saw nothing unduly repetitive in the text, but perhaps the words "of a temporary nature, as they exist for a limited period", could be edited and the words "limited in time and scope", reduced to "limited in scope".

113. The CHAIRPERSON said that the Committee would continue its consideration of the text at its next meeting.

The meeting rose at 1 p.m.